Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-752

# In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. LIGHTNER, d/b/a LIGHTNER AUTO SALES, PETITIONER

*v.*

BARRY JONES AND BRUCE WHITE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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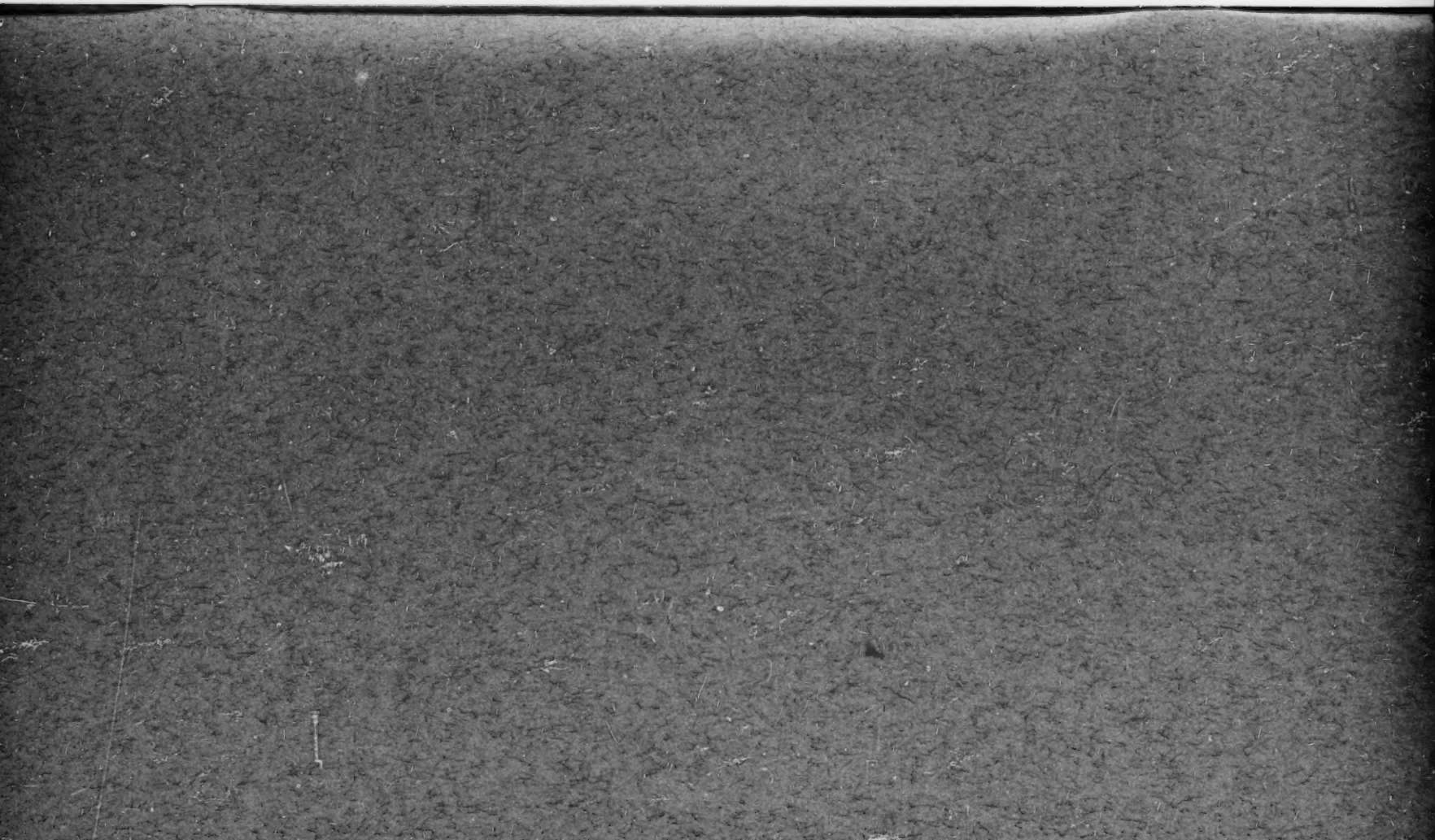

## QUESTION PRESENTED

Whether petitioner's suit against respondent federal officials for alleged violations of due process and the Racketeer Influenced and Corrupt Organizations Act (RICO) is barred by qualified immunity when there is no case law suggesting that respondents' conduct in any way violated either RICO or the Due Process Clause.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 820 F.2d 818. The opinion of the district court (Pet. App. D2-D13) is reported at 564 F.Supp. 1112.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on May 8, 1987. A petition for rehearing with a suggestion of rehearing en banc was denied on August 3, 1987 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on November 2, 1987 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. From October 1980 through March 1982, the Federal Bureau of Investigation (FBI) conducted an undercover operation in the St. Louis area known as Operation Recoupe designed to shut down several large-scale stolen car rings. The FBI had previously been unable

to penetrate these crime rings which were responsible for 10,000 stolen vehicles per year in that area. C.A. App. 67.[1] Under Operation Recoupe, the FBI purchased auto wrecks and sold their titles and vehicle identification numbers (VINs) to targeted suspects, who used them to "retag" stolen cars, which then appeared to have legitimate titles. The FBI attempted to trace the flow of the VINs in order to determine the nature and extent of the stolen car distribution rings. Pet. App. 3; C.A. App. 68-69.

At the same time, the FBI was conducting a smaller investigation of a suspected stolen car and retagging operation run by Leroy Morton. A local used car dealer named David Lauck approached the FBI and agreed to provide information against Morton, who had asked him to distribute stolen, retagged cars.[2] C.A. App. 69, 72, 82-83. The FBI decided to accept Lauck's offer, but never told Lauck about Operation Recoupe (C.A. App. 81-84). Lauck distributed stolen cars for the Morton group, some of which coincidentally had VINs provided by the FBI pursuant to Operation Recoupe (C.A. App. 69-71). Lauck furnished the FBI with information regarding the retagging and distribution of the stolen cars (C.A. App. 72, 84).

In May 1981, Illinois police seized a stolen car from the lot of petitioner David Lightner, a used car dealer in the area (Pet. App. D3-D4). This car had previously been in the possession of Lauck, who had arranged for its sale on behalf of the Morton crime organization. The FBI feared that its seizure would focus suspicion on Lauck as a possible informant, and that he would be harmed or killed. C.A. App. 71, 95-98. Accordingly, respondent FBI Special Agent Barry Jones telephoned Illinois police and

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[1] "C.A. App." refers to the appendix filed in the court of appeals.

[2] This person is wrongly identified in the district court opinion as David Locke (Pet. App. D3).

asked them to release the vehicle to petitioner and reassure him that it was not stolen (C.A. App. 108, 111-114).

A similar situation arose with respect to another stolen car that had been put up for sale by Lauck on behalf of the Morton organization. Again, the FBI feared that Illinois police interest in the vehicle would put Lauck in jeopardy and threaten the ongoing criminal investigation. C.A. App. 70-71, 95-98. Therefore, respondent Jones asked the Illinois police to release that vehicle too. Petitioner subsequently purchased the car. Pet. App. D4.

Petitioner eventually sold both cars, as well as other cars retagged with VINS provided by the FBI. When Operation Recoupe ended, the stolen cars were traced and seized by law enforcement officials and returned to their original owners or to insurance companies that had already paid claims on them. C.A. App. 54-55, 72, 84-85, 106-107, 114, 119. Operation Recoupe and the separate Morton investigation were highly successful, resulting in over 100 convictions (C.A. App. 72). FBI informant Lauck has relocated out of Missouri. His life has been threatened because of his activities assisting the FBI. C.A. App. 86.

2. The ultimate purchaser of one of the stolen cars sold by petitioner sued him in Illinois state court after the car was seized. Petitioner then filed a third-party action in that court against the other auto dealers who had sold him the stolen cars. He also named as third-party defendants certain Illinois police officers, as well as the United States Attorney General and respondents Special Agent Jones and former Assistant United States Attorney Bruce White. Petitioner sued the federal defendants in their individual capacities on a variety of counts, including a deprivation of property in violation of the Fifth Amendment, a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) provisions of 18 U.S.C. 1961 *et seq.*, and two common law state tort claims. The federal defendants removed the case to federal court, and that court granted a

motion to dismiss for lack of in personam jurisdiction the claims against the Attorney General. See 564 F. Supp. 1112 (N.D. Ill. 1983).

In June 1984, the district court granted a partial dismissal of the action against respondents (Pet. App. D2-D13). The court dismissed the two common law state tort claims on the basis of absolute immunity, but declined to dismiss the RICO and constitutional claims (Pet. App. D6).[3] It specifically rejected the claim of qualified immunity as to the constitutional claims, concluding that petitioner's allegations were sufficient to state a constitutional claim for intentional deprivation of property without due process, and that a "genuine issue of fact exists as to whether these federal defendants should reasonably have known that their conduct would violate [petitioner's] constitutional rights" (Pet. App. D13).[4]

3. Respondents immediately appealed the denial of qualified immunity. The Seventh Circuit dismissed the appeal, finding the interlocutory judgment non-appealable. 752 F.2d 1251 (1985). Following this Court's ruling in *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985), however, the appeal was reinstated, and the Seventh Circuit reversed the decision below, holding that respondents are protected by qualified immunity (Pet. App. A2-A10). The majority

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[3] Petitioner did not contest the dismissal of the state tort claims in district court (Pet. App. D6) or raise the issue on appeal. Nor does he challenge the dismissal of those counts in his petition. Accordingly, the Court's recent decision in *Westfall* v. *Erwin,* No. 86-714 (Jan. 13, 1988), has no bearing on this case.

The court rejected respondents' argument that the RICO claim was, like the state law claims, barred by absolute immunity, and also rejected the assertion of respondent White that his conduct was protected by absolute prosecutorial immunity (Pet. App. D6-D9).

[4] The district court did not discuss the applicability of qualified immunity to the RICO claim.

ruling was based on separate opinions filed by Judges Pell and Flaum (Pet. App. A2).

Judges Pell and Flaum both noted that qualified immunity is governed by an objective test, looking to whether government officials have violated a clearly established constitutional right. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). They further observed that "clearly established" does not mean simply that the right has been stated in general terms, but rather requires indication in the existing case law that the actual conduct in question violates the plaintiff's rights (Pet. App. A4-A5, A7, A9-A10). Both judges concluded that this standard was not met here because there were no reported cases finding a Fifth Amendment due process violation in analogous circumstances (Pet. App. A5-A7, A10). While both indicated that qualified immunity could still be denied if the government officials' conduct was egregious, neither found that respondents' conduct fit that description (Pet. App. A7-A8, A10).[5]

## ARGUMENT

The decision below does not conflict with any decision of this Court or any other court of appeals; nor does petitioner even claim such a conflict. In fact, the decision below follows directly from this Court's recent decision in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987). Accordingly, no further review is warranted.

1. In *Anderson*, the Court reaffirmed (slip op. 2-3) the holding in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), that government officials are immune from suit involving their official actions unless it was "clearly established" at the time that their acts would violate the plaintiff's rights. Accord *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986);

[5] Judge Wisdom dissented because he believed that the United States government should pay for the costs of Operation Recoupe (Pet. App. A13).

*Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985). As the Court explained in *Anderson* (slip op. 3-4), this means not merely that a general right alleged to have been violated is clearly established, but further that a reasonable official would know that his own particular conduct is in violation of that established right (*id.* at 4). The Court stressed (*id.* at 4-5): "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, * * * but it is to say that in light of preexisting law the unlawfulness must be apparent."

The test stated by the Court in *Anderson* is precisely the test applied here by the court of appeals. See Pet. App. A4-A5, A7, A9-A10. Conversely, in denying qualified immunity, the district court made the precise error condemned in *Anderson* of focusing on the fact that the right to due process is itself well established without looking to see whether preexisting law made it apparent that respondents' conduct was unlawful. See Pet. App. D12 ("It can hardly be disputed that the plaintiff had a right not to be deprived of his property without due process."). Petitioner has wholly failed to point to *any* case law that would inform a reasonable official that respondents violated petitioner's rights when, in order to protect Lauck's life and the ongoing investigation, respondent Jones asked the Illinois police to release the vehicles in question. He has not only failed to establish a violation of a clearly established right—he has failed to show that his rights have been violated at all. See Pet. App. A5-A6.[6]

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[6] The federal courts have in a variety of circumstances deferred to the judgments of law enforcement officials regarding how best to protect informants and to determine when to end an ongoing investigation (see, *e.g.*, *Bergmann* v. *United States*, 689 F.2d 789, 794-795 (8th Cir. 1982); *Beard* v. *Mitchell*, 604 F.2d 485, 495-496 (7th Cir. 1979); *Leonhard* v. *United States*, 633 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981); *Smith* v. *United States*, 375 F.2d 243, 248 (5th

2. Petitioner's second claim—that his RICO count should not have been dismissed—is wholly without merit. As the court of appeals noted (Pet. App. A2), petitioner failed to allege facts sufficient to make out the essential element of criminal intent. Indeed, it is perfectly clear that respondents' conduct did not violate the statute because the requisite criminal intent was lacking. See *Baucom* v. *Martin*, 677 F.2d 1346, 1350-1351 (11th Cir. 1982); *United States* v. *Rosner*, 485 F.2d 1213, 1223 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). Respondents were accordingly entitled to dismissal of this count, either on the merits or under the defense of qualified immunity.[7]

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Cir.), cert. denied, 389 U.S. 841 (1967)), and have declined to criticize police conduct analogous to that taken here (*e.g.*, *United States* v. *Brown*, 635 F.2d 1207, 1212-1214 (6th Cir. 1980)).

[7] Judge Wisdom concluded (Pet. App. 13) that the costs of Operation Recoupe should be borne by the United States government. The question before the court of appeals, however, was whether respondents Special Agent Jones and AUSA White could be held individually liable for petitioner's losses. Whether the United States should be liable to petitioner is a totally different question, which was not before the court of appeals and is not now before this Court. We are informed by the United States Attorney handling the case that petitioner has amended his third-party complaint in the district court to add the United States as a third-party defendant. The liability of the United States, if any, is therefore yet to be determined.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60242